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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-786

ROBERT STEPHEN BASEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petitioner's Reply to Memorandum for the United States in Opposition

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Petitioner feels compelled to respond to the Memorandum in Opposition because the Government has raised therein arguments not covered in the Petition for Writ of Certiorari. The Government's Memorandum embarks upon a discussion of the "facts" which not only distorts the evidence presented at trial and suggests inferences which petitioner contends are wholly unwarranted, but also totally obscures the significant issues presented to this Honorable Court for review.

This reply is submitted pursuant to Rule 24(4), Revised Rules of the Supreme Court of the United States. The arguments presented in the petition for writ of certiorari principally focused upon the District Court's erroneous failure

to grant petitioner's motion for acquittal at the close of the Government's case relying principally upon *United States v. Russell*, 459 F.2d 671 (9 Cir. 1972), certiorari granted, October 16, 1972 (No. 71-1585), petitioner urged that the conduct of the undercover agents as disclosed by the evidence in this case constitutes entrapment as a matter of law. Compounding its error, the trial court misstated the evidence to the jury. Relating to the jury's question whether the Government supplied an ingredient essential to the manufacture of the illegal substance involved in Count I of the Indictment, the trial court stated "there's just no evidence establishing that one way or the other" (Tr., pp. 109-110) (see Petition, p. 7, and Memo, in Opp., p. 5). Although it is petitioner's contention that the question of entrapment should never had gone to the jury at all, having sent the case to the jury, the trial judge had the responsibility to answer jurors' questions fully, and not to characterize the state of the evidence in an inaccurate or misleading way. As was stated in the petition, "it is the lower court's approach to this factual issue [of entrapment] which petitioner's believes to be the heart of the problem" (Pet., p. 7). Petitioner urges as his reasons for allowing the writ not only the gross errors committed by the trial court below but also the necessity of this Honorable Court's resolution of the confused and disparate positions taken by the various circuits and within the Ninth Circuit itself on the entrapment defense.

The Government attempts to reconcile the obvious conflicts within the Ninth Circuit on the issue of entrapment by attempting to distinguish *Russell*, supra. The Government argues that in *Russell* the defendants would have been "powerless" to commit the charged offenses without persuasive intervention by Federal agents, whereas in the instant case petitioner *could have* committed the charged offense

without such aid. The pertinent language in *Russell* is where Judge Ely states:

> "The challenged conduct on the part of the Government's agent was the supplying of the phenyl-2-propanone, a chemical essential to the manufacture of methamphetamine. The agent himself testified that this chemical was *difficult to obtain* because one must have a manufacturer's license to purchase it at a chemical supply house and because many suppliers were, at the request of the Bureau of Narcotics, no longer selling it at all. *Thus,* there could not have been the manufacture, delivery, or sale of the illicit drug had it not been for the Government's supply of one of the essential ingredients" (*United States v. Russell,* 459 F.2d 671, 672) (Emphasis added).

From this language it is clear that the *Russell* court's conclusion that the defendant there was "powerless" to commit the charged offense rested on the same identical facts as were proved at petitioner's trial, namely that P-2-P was essential to the manufacture of methamphetamine and that P-2-P is extremely *difficult* to obtain. Nowhere in the *Russell* opinion does the court place upon defendant the responsibility or burden of proving under these circumstances that P-2-P was *impossible* to obtain from any other source but the Government agents. The Memorandum in Opposition, however, focuses upon petitioner's failure to prove that he did not and could not obtain the P-2-P from another source.[1]

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1. The Government goes so far as to suggest that petitioner had a *duty* to come forward with such evidence. The Memorandum in Opposition states at page 9 that: "The only person who could have supplied direct contrary evidence was petitioner. The fact that there was not a 'shred of evidence' supporting his petition is due to petitioner's strategic decision not to testify." On this point attention is directed to argument which appears at pages 14 through 16 of the petition for writ of certiorari which, incidentally, the Government's Memorandum also completely ignores.

After attempting to shift the burden of proof to petitioner herein, the Government goes on to discuss the facts in a manner wholly unwarranted by the record. The Government's Memorandum states, "The record is *uncontroverted* that Agents Bullock and Hochman had supplied no P-2-P to petitioner *or his associates* at the time the 0.9 gram sample was delivered on June 15" (Memo. in Opp., pp. 6-7) (emphasis added). This is simply not true. The evidence clearly showed that prior to June 4, Government agents in Boston had sent to Karen Lyons, an associate of petitioner herein, four 500 gram bottles of P-2-P (Tr., p. 47). Evidence showed that this P-2-P was to be used in the manufacture of three pounds of methamphetamine which was to be supplied to Agents Bullock and Hochman (Tr., p. 54). At the time the P-2-P was sent to Lyons, she was not engaged in the manufacture of methamphetamine and in fact depended upon the P-2-P supplied by the Government in order to produce that drug (Tr., p. 46). At the June 10 meeting with Agent Bullock, Lyons said she finally had contacted "her man" and that she had three bottles of P-2-P remaining of the four originally sent by Government agents in Boston (Tr., p. 51). The evidence also showed that at the June 15 meeting, petitioner and Agents Bullock and Hockman discussed among other things the "previous arrangement that had been made" regarding the supply of P-2-P in return for the finished methamphetamine (Tr., p. 16). The evidence showed that at all times prior to June 15, and on that date, Agents Bullock and Hochman represented themselves to be the ones who had sent the P-2-P from Boston (Tr., pp. 43-44). It is clear that at this time the Agents were still seeking a return of three pounds of methamphetamine for the P-2-P which had been supplied to Lyons from Boston (Tr., pp. 54, 62, 63).

Additionally, Agent Bullock testified that he and Hochman drove a "hard bargain," insisting upon amphetamine worth about $400 for every $60 worth of P-2-P (Tr., pp. 55-56). They were able to do so because P-2-P was obtainable only through a special "connection" of the type these Agents represented themselves to be (Tr., pp. 56-57). Bullock admitted that the defendants could get everything else but the P-2-P (Tr., p. 57). Clearly the Government's statement as to the "uncontroverted" evidence that the agents supplied no P-2-P to petitioner or his associates prior to June 15 is false. Moreover it is on facts identical to these that the court in *Russell*, supra, concluded that manufacture of amphetamine there was impossible but for the Government's supply of P-2-P. From these facts it is also clear that the trial court below erroneously stated to the jury that there was "just no evidence establishing that [the source of the P-2-P in the sample delivered on June 15] one way or the other". *Certainly there was substantial evidence of that from the Government's witnesses themselves.*

After making the unsupported statement discussed above, the Memorandum in Opposition proceeds to argue that the record discloses two grounds from which it could be inferred that the P-2-P used to make the petitioner's sample came from a source other than the Government shipment from Boston. These grounds are similarly without merit.

First the Government argues, the difference in purity between the sample delivered on June 15 (100 per cent D1-desoxyephedrine) and the amphetamine turned over on June 18 (64 per cent D1-desoxyephedrine) "indicates that they were not necessarily manufactured from the P-2-P supplied by the undercover agents" (Memo. in Opp., p. 7). Petitioner agrees that the difference in purity does not "necessarily" prove manufacture from the same P-2-P, but neither does it prove, or even raise a reasonable in-

ference, that the amphetamine produced and delivered on June 15 and June 18 were *not* manufactured from the same P-2-P. The difference in purity neither establishes nor infers anything. The Memorandum in Opposition refers to no part of the record wherein any link between purity and a particular source of P-2-P could be drawn. To the contrary, the Government's expert witness in chemical analysis, Gary Sorgen, stated that the impurities were merely "a side product" in the manufacture of amphetamine (Tr., p. 75, lines 14-16). He stated that there was hardly ever a 100 per cent reaction in the amphetamine process (Tr., p. 78, lines 16-19) and that any impurities in the finished product could be *either* "any salt or some other additive" (Tr., p. 79, lines 5-12). No where in the transcript is there any statement wherein Mr. Sorgen indicates any relationship between any particular P-2-P and the purity of the finished amphetamine. Accordingly, the difference in purity can support no reasonable inference regarding the source of the particular P-2-P in any given quantity of amphetamine.

Next the Government's Memorandum suggests that an inference that there was an alternative source of supply available can be drawn from the testimony of Agent Hochman to the effect that petitioner had mentioned a P-2-P laboratory both at the time of the transaction on June 18 and after his arrest. The statement to which the Government refers is found at page 93 of the transcript where Agent Hochman testified:

> "He also mentioned that since we were insistent upon seeing the laboratory he could show us photos of a phenyl-2-propanone laboratory; but it would take a week until he had it."

From this statement it appears that petitioner, if he in fact had made such statement, acknowledged that he did not have such a P-2-P laboratory at the time. The statement

was that it would take a week until he had the laboratory, therefore, it would seem clear that no laboratory existed at the time petitioner allegedly made that statement. It was not until after petitioner's arrest that he allegedly told Agent Hochman that he knew of a P-2-P laboratory which in fact existed and was producing any chemicals (Tr., p. 94). The alleged existence of this laboratory clouds the issues for several reasons. First, there was no substantiation in the record that what Agent Hochman referred to as a "laboratory" was in fact a P-2-P laboratory, or indeed a laboratory at all. Whereas the chemist testified that he had examined what purported to be the amphetamine laboratory (Tr., p. 82), no description of any kind was given with regard to this alleged P-2-P laboratory. Accordingly whatever Agent Hochman saw could very well have been nothing more than an assortment of beakers and flasks. His testimony does not reveal that he found any P-2-P in that alleged laboratory.

Moreover, the existence of such a "productive" laboratory would contradict everything that Agent Bullock said with regard to the fact that defendants could get everything they needed for the manufacture of amphetamine except P-2-P (Tr., p. 56, lines 24-p. 57, line 5).

The difficulty of obtaining P-2-P is punctuated by the fact of petitioner's willingness to supply $400 worth of amphetamines for $60 worth of P-2-P (Tr., p. 56). Regarding the negotiations which occurred on June 15, where the Agents drove "a hard bargain," it would seem more plausible that petitioner would have mentioned the existence of alternative means of supply as a method by which he might obtain a more favorable deal than that which he accepted. However on June 15, the date in question, no mention of alternative supply channels was even suggested. Moreover, it can be noted that if such a P-2-P laboratory was in exis-

tence and producing that chemical, it would have provided the prosecution with grounds for negativing the entrapment defense on the other counts of the Indictment, rather than on Count I. By Agent Hochman's own testimony, the alleged P-2-P laboratory could not have existed prior to June 25 (one week later than June 18). It could, therefore, not have provided a supply for the sample which was delivered on June 15. If the jury disregarded the alleged laboratory, which supposedly existed at a time after June 18, it would seem absurd to accord the existence of such a laboratory any relevance at a time prior to June 18. Certainly the laboratory could not have produced the P-2-P which was used to manufacture the sample delivered on June 15.

After considering the weaknesses of the Government's factual rendering, we are still left with the basic issues presented in the petition, namely the issue of whether or not the trial court erred in submitting the entrapment defense to the jury. As already pointed out, petitioner's arguments with regard to this question have not been discussed in the Government's Memorandum. Instead, the Government has chosen to attempt to dichotomize the facts with regard to Count I from those referring to the other counts. This approach has not only led to a tortured rendering of the evidence adduced at trial, but a complete avoidance of the substantial questions posed by the doctrine of entrapment under the circumstances of this case. With the defendant presenting no evidence at trial, the jury acquitted him on three of the four counts charged. Perhaps anticipating the sense of injustice that prompted the court of appeals in *Russell*, the jury apparently came to focus upon the Agents' conduct in supplying an indispensable ingredient of the illicit substance. *It is probable, they would have acquitted petitioner on Count I as well had they not been misadvised by the Court as the actual state of the evidence.*

This Court has already considered the issues here presented significant enough to grant certiorari in the *Russell* case. The instant petition is equally meritorious and should not be denied—particularly on the basis of the unwarranted inferences which the Government now proposes can or should be made from the evidence at trial.

Dated: January 30, 1973.

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